No. 46790-9Ø-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MELVIN L. HARTFIELD,

APPELLANT,

ON APPEAL FROM THE

SUPERIOR COURT OF THE STATE OF WASHINGTON,

PIERCE COUNTY, No. 14-1-02239-7

The Honorable Philip K. Sorensen,

APPELLANT'S SUPPLEMENTAL PRO-SE BRIEF

Melvin Hartfield
Appellant, Pro-se

Melvin Hartfield 48519
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SMH: wd

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A. ASSIGNMENTS OF ERROR

1. As a matter of law, the trial court erred in granting a proposed lesser included offense instruction because it was inappropriate to instruct the jury on an offense that the State has not charged when it is not a lesser included offense.

2. The defendant was deprived of effective assistance of counsel for proposing an erroneous lesser included offense jury instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Washington's first degree theft statute create two alternative means by which an individual may commit the offense. Was the trial court required to refuse a requested jury instruction as a matter of law when it is inappropriate to instruct the jury on an offense that the State has not charged?

2. A party who request a jury instruction on a lesser included offense must demostrate to the court that all the elements of the lesser included offense are a subset of the elements of the charged offense.

The "elements" test requires a textual comparison of criminal statutes which leads itself to certain and predictable outcomes. Does the trial court abuse it's discretion when it grants a lesser included offense instruction when prohibited from doing so as a matter of law?

3. Defense counsel elected to pursue "all or nothing" approach based on the belief that State would not be able to prove appellant used or threatened the use of force to effect robbery. Is counsel ineffective when compromising this strategy with an erroneous lesser included offense jury instruction?

C. STATEMENT OF THE CASE

Pretrial, trial, and sentencing proceedings were held before the **Honorable Philip K. Sorenson** on September 25th (pretrial), 29th-30th (trial), and October 17th, 2014 (sentencing).

On June 10th, 2014 the appellant was charged in the Pierce County Superior Court (Tacoma, Wa) with first degree robbery by information (RCW 9A.56.190; RCW 7.88.010; RCW 35.38.060; RCW 9A.56.200(1)(b)...), State v. Hartfield Cause No. 14-1-02239-7. CP 1-2. No amended information was filed prior to trial in this matter.

On September 25th, 2014 the appellant moved the trial court substitution of counsel due to an irreconcilable conflict of interest. RP 7. Appellant declined to accept plea agreement offer contrary to counsel's advice. RP 13. Trial court denied appellant's motion. RP 7-10. Even after trial court denied motion, counsel's persistence to get appellant to accept plea agreement offer continued. RP 13.

On September 29th, 2014 trial commenced. Marlene Wheeler, Assistant Manager Heritage Bank testified that on the morning of June 5th, 2014 she heard the doorbell which indicate someone had entered the bank via back door alley entrance. RP 72-73. Moments afterwards a man appeared and she greeted him. RP 71-73. M. Wheeler testified that the man was holding a piece of paper which led her to believe that she was about to be robbed. RP. 72-73. M. Wheeler could not give a good description except that he was black, medium build and tall in comparison to her. RP 74.

According to M. Wheeler, the note was not well organized, it contained a lot of instructions.

RP 75. She was only able to read the part of the note which stated, "this is a robbery" before the man took the note back out of her hands. RP 75-76

M. Wheeler stated that there was close to $20,000 in her till at the time of the robbery however, she refused to give the man any of the big bills. RP 77-78. She retrieved a bait money dummy pack from her till which contained a dye-pack, "I gave that to him". RP 80. M. Wheeler said the man detached the currency from the dummy pack, "he was pulling it apart", then tossed the dye-pack back at her, "he didn't want it". RP 82-83.

The entire encounter was captured on bank surveillance video. The surveillance video taken from June 5th, 2014 captures a man at teller window one fanning a dummy pack, the man discovers a dye-pack device and thereby rejects the dummy pack (including dye-pack) without detaching or attempting to detach currency attached to the dummy pack. Ex 1. M. Wheeler stated the man exit the bank out the back alley entrance and she dialed 911 as oppose to pushing the silent alarm. RP 84-85. M. Wheeler said the man only ended up with between $400 and $600. RP 80.

M. Wheeler testified that the man never threatened her nor did he appear to be armed. RP 86. She said that she wasn't afraid, "not feeling fear or threat or any such thing", " just overwhelming anger". RP 87. M. Wheeler said the man's demeanor was "pleasant" initially, but "anxious" and "nervous" while at the teller window. RP 86-87.

Defense counsel, when confronted with multiple inconsistecies in M. Wheeler's testimony after viewing the surveillance video of the bank, counsel failed to cross-examine M. Wheeler as to what actually transpired in reference to dummy pack dye-pack currency attached detached testimony. Nevertheless, the jury viewed the surveillance video of the encounter. RP 110-111/Ex 1 (Segments 1,2,and 3).

Video from the bank's surveillance video was collected by Cindy Atwood, Branch Manager. RP 105. C. Atwood stated that exhibit marked number 1 is the video surveillance of "the robbery" that occurred on June 5th, 2014. RP 106. The trial court admitted exhibit number 1 as evidence. RP 107.

C. Atwood testified that only 4 clips were found to have something pertinent to the case. RP 105-106. C. Atwood stated she pulled the video and

provided it to Tacoma Police Department. RP 106. C. Atwood stated that teller window one footage consist of three separate segments in which you have to play in consecutive order to view the entire encounter involving M. Wheeler and the appel lant. PR 110.

Defense counsel pursued the basic "all or nothing" strategy throughout trial, RP 86,87,91-92,94,148-149, and 161. And in his closing argume-nts, "it wasn't a robbery" RP 204, "no suggestion that Ms. Wheeler was placed in any kind of fear or had any kind of fear of Mr. Hartfield" RP 207, "The evidence in this case with regard to the use of immediate force or threatened use of immediate force is scant, and the only thing that you heard about it was from Ms. Wheeler and it was only after it was suggested by Mr. Hill, and I submit to you, ladies and gentleman, that that's doubt". RP 208. However, contrary to this strategy, instead of move the trial court to dismiss, defense counsel moved the trial court for an erroneous lesser included offense jury instruction. RP 164-65, 172.

The trial court failed to make the elements test analysis which requires a textual comparison of

of criminal statutes. RP 175. As a matter of law, the trial court was prohibited from granting the erroneous jury instruction. However, the trial court ruled to the contrary. RP 182.

The jury acquitted the appellant of first degree robbery however, found the appellant guilty of the uncharged offense, first degree theft. RP 182

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING ERRONEOUS JURY INSTRUCTION THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL AS VIOLATIVE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

a. AN Error raised for the First time on Appeal is appropriate when it Results in a Manifest Error affecting a **Constitutional Right**.

RAP 2.5(a)(3). An error is 'manifest' if it results in actual prejudice to a defendant or when a defendant makes a plausible showing that the asserted error had practical and idetifiable consequences in the trial of the case. **State v. WWO Corp., 138 Wn. 2d 595, 602-03, 980 P.2d 1257 (1999).**

In the instant case, after previewing the merits of Mr. Hartfield's claimed constitutional error, he

is likely to succeed as first degree theft is not a lesser included offense of first degree robbery. State v. Roche, 75 Wn.App. 500, 878 P.2d 497 (Div. I, 1994), (note: Cited for the second basis of the Roche court ruling based on a straightforward application of the Workman legal prong). State v. Rodacker, 1999 Wn.App.at ANALYSIS (A). Under Article I, §22 of the Washington State Constitution, it is error to try and convict a defendant of a crime that is not charged. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S. Ct. 1143, 103 L.Ed.2d 734, reh.g. denied, 490 U.S. 1076, 109 S.Ct. 2091, 104 L.Ed.2d 654 (1989); State v. Irizarry, 111 Wn.2d 591, 591, 762 P.2d 432 (1988); State v. Markle, 188 Wn.2d 424, 432, 823 P2.d 1101 (1992); State v. Carr, 97 Wn.2d 436, 439, 645 P2.d 1098 (1982).

b. The Invited Error doctrine does not Operate to deprive an accused of a constitutional right under the circumstances of this case. Under the "invited error", "a party who sets up an error at trial cannot claim that very action on appeal". State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

In the instant case, Mr. Hartfield's closing argument reflects that defense counsel argued the "all or nothing" approach. RP 204, 207-08. The context shows the argument "was directed solely towards acquittal on the first degree robbery charge". **State v. Sharkey, 172 Wn.App. 366, 391, 289 P.3d 765 (Div. III, 2012).** In this regard, Mr. Hartfield did not invited the trial court's error. **Id.**

c. The Trial Court has Discretion When it Rules on requested Jury Instructions. An appellate court will not disturb a trial court's evidentiary ruling unless the court clearly abused its discretion. **State v. Walker, 136 Wn.2d 767, 771, 966 P2d 883 (1998).** A trial court abuses its discretion "when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons". **State v. Kennealy, 151 Wn.App 861, 879, 214 P3.d 200 (2009), (citing, Caroll v. Junker, 79 Wn.2d 12, 26 482 P.2d 775 (1971).**

d. Washington's Theft Statute (first degree theft) Creates Two Alternative Means by which an individual may Commit Offense.

The theft statute provides in pertinent part:

> Theft means: To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with the intent to deprive him (or her) of such property or services. **RCW 9A.56.020.**

A person is guilty of first degree theft if he or she commits theft of: property or services valued in excess of $1,500 or taken from the person of another regardless of the value other than a firearm as defined in **RCW 9.41.010. RCW 9A.56.030(1)**

The Supreme Court has developed a two-part test for determining when such a lesser included offense instruction is appropriate:

> 1. **Each of the elements of the lesser offense must be a necessary element of the offense charged, and-**
>
> 2. **The evidence in the case must support an inference that the lesser crime was committed.**

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); Accord, State v. Pacheco, 107 Wn.2d 59,69-70, 726 P.2d 981 (1986). See also RCW 10. 61.006.

In its essentials, each of the elements of a

lesser included offense must be a necessary element of the offense charged. **State v. Bowen, 12 Wn.App. 604, 531 P.2d 837 (1975).** A defendant is not entitled to an instruction on a lesser included offense merely because he makes such a request. **State v. Snider, 70 Wn.2d 326,422 P.2d 816 (1967).**

First degree theft can be commited by two alternative means: **(1) Taking Property Valued in Excess of $1,500; (2) Taking Property From The Person Of Another Regardless Of The Value.**

Under the legal prong (analysis), not all of the uncharged alternative means of committing the greater offense have to be present in the lesser offense to justify a lesser included instruction. The requirement is the exact opposite.

In the case at hand, the appellant was charged with first degree robbery. **RCW 9A. 56.190; RCW 9A.56.200(1)(b); RCW 35.38.060; RCW 7.88.010.** Robbery is statutorily defined:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence,or fear of injury to

that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which case the degree of force is immaterial. RCW 9A.56.190. A person commits first degree robbery when in the commission of a robbery he or she commits robbery within and against a financial institution defined in RCW 7.88.010 and RCW 35.38.060. RCW 9A.56.200 (1)(b).

In this regard, under the Workman test, if the greater offense (as charged) can be committed without committing the lesser offense (legal prong) then a lesser included offense instruction is inappropriate. See State v. Rodacker, 1999 Wn.App. at Lesser Included Offense (ANALYSIS)(A)

In the instant case, Mr. Hartfield submits that if first degree robbery (as charged) can be committed without committing first degree theft, then no lesser included offense instruction is available.

The trial court was required to refuse defense counsel's requested instruction as a

matter of law because it is inappropriate to instruct the jury on the first degree theft offense that the State has not charged when it is not a lesser included offense. This requires a de novo review. **State v. Walker, 136 Wn.2d, supra at 772.**

Robbery occurs when a defendant is armed with a deadly weapon, appears to be armed with a deadly weapon, or inflicts bodily injury. **RCW 9A.56.200.** On the other side of the coin, the elements of first degree theft are (1) wrongfully obtaining or exerting unauthorized control over (2) the property of another (3) with the intent to deprive him of such property (4) valued in excess of $1,500 or "taken from the person of another" regardless of the value. **RCW 9A.56.020 (1)(a); RCW 9A.56.030 (1)(a),(b).**

In comparing the elements of both of these offenses it is possible to commit first degree robbery without committing first degree theft by taking property not valued in excess of $1,500.

Here Mr. Hartfield argues that first degree robbery may be committed without committing first degree theft by taking property not valued in ex-

cess of $1,500. Since first degree theft is not a lesser included offense of first degree robbery, the legal prong of the Workman test has not been satisfied.

In sum, it is an "ancient doctrine" that a criminal defendant may be held to answer for only those offenses contained in the indictment or information. **See Schmuck, 489 U.S., supra at 717-18. See also State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)** (trial court must consider all the presented evidence when deciding whether or not to give a lesser included instruction).

In conclusion, Article I, §22 of the Washington State Constitution, which provides greater protection than its federal counter-part, appellant submits that it was error to try and convict him of a crime that is not charged in the information. **Schmuck, Id.; Irizarry, 11 Wn.2d supra at 592.**

Without a doubt, the trial court abused its discretion in allowing the lesser included instruction. This manifest error effecting a constitutional right is apparent due to the nature of the error, and therefore, prejudice is clear.

E. CONCLUSION

Based on the foregoing, Mr. Hartfield respectfully request that this court reverse the conviction and remand with instructions to dismiss with prejudice.

Respectfully Submitted,

APPELLANT

ARGUMENT

2. THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant contend that counsel was ineffective for proposing an erroneous lesser included offense instruction.

In order to establish ineffective assistance of counsel the defendant must show that (1) counsel's performance was deficient, and (2) counsel's errors were so serious that it deprived defendant of a fair trial. **Strickland v. Washington, 466 U.S. 687, 688, 107 S.Ct. 2052, 80 L.Ed.2d 674 (1984).**

Deficient performance is established by proof that defense counsel's representation "fell below an objective standard of reasonableness" based on consideration of all the circumstances. **State v. McFarland, 127 Wn. 2nd. 322, 334-35, 899 P2.d 1251 (1995).** Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance. **State v. Garrett, 124 Wn. 2d. 504, 520, 881 P.2d 185 (1994).** Rather, in analyzing themes to gauge whether a tactical decision to request an erroneous lesser included offense instruction is " sound or legitimate", the defendant must show that he was affirmatively prejudiced by the alleged deficient performance such that, "but for counsel's **errors**, the result of the proceedings would have been different". **Strickland, 466 U.S. at 693.**

In the instant case, Mr. Hartfield was charged with Robbery in the First Degree. Generally, this crime is defined as a defendant who is armed with or have been armed with a deadly weapon, appeared to be armed with a deadly weapon, or inflicts bodily **injury.** RCW 9A.56.200.

The State opposed trial counsel's proposed

lesser included offense jury instruction as first degree theft is not a lesser included offense of first degree robbery. **State v. Roche, 75 Wn.App. 500, 878 P.2d 497 (1994) (Cited for second basis of Roche court ruling on "lesser included offense").**

In considering defense counsel's "all or nothing" approach throughout trial and during closing argument, it may be concluded that counsel chose this approach to achieve an outright acquittal.

Mr. Hartfield argues that due to defense counsel's extensive history at practicing law and the numerous resources he had available at his disposal, requesting an erroneous jury instruction which misled the jury into misapplying the law thereby making it easier for the jury to convict the defendant of the erroneous requested lesser offense is "Constitutionally Inexcuseable". **Lankford v. Arave, 468 F.3d at 585 (2006); Yarborough v. Gentry, 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed. 2d 1 (2003) (the right to effective assistance of counsel extends to closing arguments).** Mr. Hartfield further argues that counsel unwittingly undermined the very "adversarial testing process" he was suppose to protect. **Lankford**

v. Arave, 468 F.3d at 585 (2006) (quoting Strickland, 466 U.S. at 688). The defendant submits that counsel's deficient performance in proposing the erroneous jury instruction exacerated the strategy posed by the "all or nothing" approach.

a. Trial counsel's performance was deficient and the defendant was thereby prejudiced. Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L. Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

In establishing the 'prejudice' prong of the Strickland test, a defendant must establish that 'there is reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different'. Id. at 694. The ultimate focus of this inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Id. at 696.

This Court in State v. Grier, 150 Wn.App.

208 P.3d 1221 (2009), reasoned that "deliberate tactical choices constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance". Id. at 640-41.

b. Counsel's erroneously proposed Lesser Included offense instruction Fell Outside the Wide Range of Effective Assistance. Counsel's improperly given lesser included offense instruction compromised Mr. Hartfield's "all or nothing" approach. This course misled the jury and posed different theories of the case.

In analyzing the overall risk to the defendant given the totality of the developments at trial, Hartfield's 'all or nothing' strategy based on the belief that the prosecution would not prove that he used or threatened the use of force to effect robbery would have been considered effective assistance of counsel. See State v. Embry, 174 Wn.App. 714, 761, 287 P.3d 648 (2012), (citing, State v. Hassan, 151 Wn.App. 209, 218, 211 P.3d 441 (2009)).

However, after being found not guilty of the charged offense, Mr. Hartfield was found guilty of first degree theft, which was inter alia,

erroneously granted by the trial court.

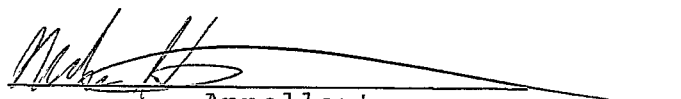
In conclusion, if counsel's error had not been committed and the lesser included instruction not given, a claim that the jury would have convicted him on the first degree robbery offense is sheer speculation. Without a doubt, Mr. Hartfield was prejudiced by such an instruction. The jury's review of the video surveillance of the bank at the time of the robbery reflects that the jury was presented with multiple inconsistencies in the bank teller's testimony which may have destroyed her credibility. Nor can it be known that the appellant benefited from the lesser included offense instruction; he may have been acquitted without it. Under the umbrella of **Schmuck**, this Court should hold that the trial court failed to make the elements test which requires a textual comparison of criminal statutes which leads itself to certain and predictable outcomes. **409 U.S. supra at 720.**

CONCLUSION

Based on the foregoing, Mr. Hartfield

respectfully request that the Court reverse his conviction and remand with the instructions consistent with its opinion.

Respectfully Submitted,



Appellant, pro-se

CERTIFICATE OF SERVICE

I, Melvin Hartfield hereby certify that I caused to be delivered by First Class U.S. Mail the foregoing legal documents under the Washington Court Of Appeals, DIV II/Cause No. 46790-9-II:

SUPPLEMENTAL PRO-SE BRIEF, RAP 10.1

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on this 6 day of July, 2015.

Mel Hartfield
Appellant

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS 6th
DAY OF July, 2015.
MY COMMISSION EXPIRES:

NOTARY PUBLIC - State of Kansas
ELIZABETH MASCORRO
My Appt Expires 1-10-2018

Elizabeth Mascorro
NOTARY PUBLIC